Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-955

UNARCO INDUSTRIES, INC., an Illinois corporation, and BITUMINOUS CASUALTY COMPANY, an Illinois corporation,

Petitioners,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JENNINGS, STROUSS & SALMON

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OPINION BELOW

This is a Petition for Writ of Certiorari from an order of the United States Court of Appeals for the Ninth Circuit, in Case No. 73-2194, dated September 17, 1975. The unreported memorandum opinion and judgment are set out in the Appendix.

JURISDICTION

The memorandum decision and order of the United States Court of Appeals for the Ninth Circuit is dated September 17, 1975, and the jurisdiction of this Court to review the memorandum decision and order by Writ of Certiorari is based upon 28 U.S.C. § 1254 which states that "Cases in the Courts of Appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or

decree".

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Ninth Circuit erred in holding that the Arizona Supreme Court would have held that the law of Arizona rather than the law of California applied to the issue of indemnity in an action in tort.

STATUTES INVOLVED

By judicial adoption, Schwartz v. Schwartz, 103 Ariz. 562, 565, 447 P.2d 254 (1968), the following sections of the Restatement (Second) of Conflict of Laws (1971) are the law of Arizona:

§ 6. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory direction of its own state on choice of law.

(2) When there is no such directive, the factors

relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

§ 145. The General Principal

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the

occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

§ 173. Contribution and Indemnity Among Tortfeasors

The law selected by application of the rule of § 145 determines whether one tortfeasor has a right to contribution or indemnity against another tortfeasor.

STATEMENT OF THE CASE AND FACTS

The Southern Pacific Transportation Company (hereinafter Southern Pacific) is a Delaware corporation with a principal place of business in California. Unarco Industries, Inc. (hereinafter Unarco) is an Illinois corporation. Bituminous Casualty Corporation (hereinafter Bituminous) is an Illinois corporation and is the liability insurer of Unarco. Belma Spears and Willard Wiley Spears, the representative plaintiffs, are citizens of Arizona, as was their intestate, Wiley Frank Spears.

In 1964, Southern Pacific, through its purchasing agents in San Francisco, California, ordered from Unarco doors for installation in 15 Southern Pacific boxcars. In 1965, 15 boxcar sets of doors were delivered to Southern Pacific in California and were installed at Southern

Pacific's Sacramento, California, plant. In 1966, Unarco redesigned the mechanical devices which support the doors and delivered to Southern Pacific at its West Oakland, California, plant 30 of the revised mechanical devices. By 1967, the mechanical devices in 14 of the 15 boxcars had been replaced in California by Southern Pacific. In 1969, the single Southern Pacific boxcar without the revised mechanical device was being unloaded in Bisbee, Arizona. The mechanical device failed, causing the boxcar door to fall, fatally injuring Wiley Frank Spears.

The surviving spouse and child, Belma Spears and Willard Wiley Spears, brought an action in the United States District Court for the District of Arizona against Southern Pacific, Unarco and California Canners and Growers, a California corporation, for the wrongful

death of Wiley Frank Spears. The subject matter jurisdiction of the United States District Court was based on diversity of citizenship pursuant to 28 U.S.C. § 1332.

In 1971, a jury returned a verdict in favor of the plaintiffs and against the defendants Southern Pacific and Unarco, jointly and severally, in the amount of $325,000.00. The defendants Southern Pacific and Unarco had previously entered into a binding agreement to reserve and preserve any and all crossclaims for indemnity or contribution for later proceedings, it being their intent to defend the plaintiffs' complaint without injecting those issues into the action, thus eliminating collateral issues from the jury's consideration. In 1972, the judgment was satisfied by Unarco and Southern Pacific. In that same year, Southern Pacific filed a crossclaim against Unarco and Bituminous in the same action, seeking

a declaration that Unarco and Bituminous had no right to contribution or indemnity against it. Unarco and Bituminous answered the crossclaim, and Bituminous filed a counterclaim against Southern Pacific seeking indemnity.

It is conceded by the parties and courts below that under the law of Arizona, Unarco and Bituminous do not have a right to seek indemnity for the entire loss against Southern Pacific, Allison Steel Manufacturing Co. v. Superior Court, 22 Ariz.App. 76, 523 P.2d 803 (1974), but do have such a right under the law of California, Cobb v. Southern Pacific Co., 251 Cal.App.2d 929, 59 Cal.Rptr. 916 (1967). Counsel for Southern Pacific stated the issue and the positions of the parties succinctly in oral argument in District Court when he stated:

> . . . It seems to me the question that is squarely presented

> to you today is a relatively simple one: Who's law governs? If it's Arizona law, I win; if it's California, he wins. I think it's just that simple. (Transcript of Proceedings, March 5, 1973, p. 3, ln. 25, through p. 4, lns. 1-3.)

The United States District Court for the District of Arizona granted Southern Pacific's motion for summary judgment and dismissed the counterclaim of Bituminous on the ground that Arizona law and not the law of California applied. It is conceded that if the law of Arizona applies, the Court properly granted Southern Pacific's motion for summary judgment. If, on the other hand, the law of California is applicable to this case, then the court erred in granting Southern Pacific's motion for summary judgment and dismissing Bituminous' counterclaim against Southern Pacific.

On appeal to the United States Court of Appeals for the Ninth Circuit,

the Court affirmed the ruling and judgment of the United States District Court on the basis that Arizona and not California was the correct choice of law.

Unarco and Bituminous now seek review of the Ninth Circuit's affirmance of the judgment of the District Court, in the United States Supreme Court on petition for writ of certiorari.

ARGUMENT

Under Rule 19(1)(b), Rules of the Supreme Court of the United States (1975), the following is listed as a reason for which a writ of certiorari might be granted: "[w]here a Court of Appeals has . . . decided an important state . . . question in a way in conflict with applicable state . . . law".

In this case, the United States Court of Appeals for the Ninth Circuit determined a question of state law in a

way in conflict with the law of Arizona as defined by the Arizona Supreme Court.

As to the choice of law issue, the United States Court of Appeals for the Ninth Circuit proceeded along the following lines. Correctly so, it stated that in diversity cases federal courts must apply the choice of law rules of the state in which the federal court sits. It then correctly stated that Arizona has adopted the grouping of contacts approach to choice of law as defined by the Restatement (Second) Conflict of Law (1971), citing Schwartz v. Schwartz, 103 Ariz. 562, 565, 447 P.2d 254 (1968). But beyond this, the United States Court of Appeals for the Ninth Circuit erred. Instead of analyzing §§ 145 and 173 of the Restatement (Second) Conflict of Laws (1971), it simply looked to Comment b to § 173 of the Restatement (Second) Conflict of Laws and

decided the case based upon the language of that comment.

As is clear from the memorandum opinion of the Court of Appeals, the ratio decidendi of that Court's conclusion that Arizona and not California law applied, was based upon the last sentence of Comment b to § 173. But under § 173, one must look to the rule of § 145 to determine whether one tortfeasor has a right to indemnity against another tortfeasor. Under § 145, the availability of indemnity in a tort action is determined by the local law of the state which, with respect to the issue of indemnity, has the most significant relationship to the occurrence and the parties. Moreover, contacts to be taken into account in deciding which law is applicable are the following four: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicil,

residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered.

It is clear from the case of Schwartz v. Schwartz, supra, 103 Ariz. 562, 565, 447 P.2d 254 (1968), that the Supreme Court of Arizona would have examined these four contacts as to the particular issue of indemnity. That analysis would reveal the following results:

(a) Arizona is the place where the injury occurred.

(b) California is the place where the conduct causing the injury occurred since the failure to install the revised mechanical device in the boxcar occurred in California.

(c) In contrast to the plaintiffs' claim against the defendants in this case, with respect to the issue of indemnity between the defendants, only the domicil, place of incorporation or place of business of the parties defendant are significant. With respect to that issue, Southern Pacific has its principal place of doing business in California. On the other hand, Unarco and Bituminout are Illinois corporations.

(d) California is the place where the relationship between the parties is centered since Southern Pacific purchased the doors and the revised mechanical devices in California; the doors were installed in

California; the mechanical devices were replaced in California; and the boxcar which fortuitously happened to be in Arizona came from California.

On balance, under § 145, the law of California and not the law of Arizona is applicable to the issue of indemnity between the joint tortfeasors. The single Arizona contact, the place of injury, is unimportant to the issue of indemnity between defendants. See § 145. In Maryland v. Capital Airlines, Inc., 280 F.Supp. 648 (S.D.N.Y. 1964), the same issue was presented to the District Court for resolution. The question before the Court was one of choice of law in the context of an indemnity claim. The plaintiff, whose decedent was a victim of an airline accident, brought an action for wrongful death under the Maryland death statute. The

airplane has taken off from an airport outside of the State of Maryland. Only because of tragic and fortuitous circumstances did the plane crash inside the boundaries of that jurisdiction. The Court was required to determine on the basis of the "most significant contacts" whether the law of Maryland or the law of New York would apply to the issue of indemnity between co-defendants. The Court concluded that New York law should apply to this issue since New York had the most significant contacts. The Court noted: "Maryland can claim at most two contacts with this case; the plane crashed there and these actions were commenced under the Maryland death statute". (280 F.Supp. at 650; see, also, Kantlehner v. United States, 279 F.Supp. 122 (E.D.N.Y. 1967).) Plainly, this would have been the same result achieved by the Supreme Court of Arizona.

The choice of law principles adopted by the Restatement (Second) Conflict of Laws are set forth in § 6 thereof. The two most important of the guiding principles as applicable to this case are a and f:

> (2) . . . the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate . . . system[s],
>
> * * *
>
> (f) certainty, predictability and uniformity of result, . . .

In the instant case, Southern Pacific is an interstate carrier which operates throughout the western and southern United States. Arguably, the incident that gave rise to the wrongful death claim of the plaintiff, Belma Spears, could have occurred in any one of the forty-eight (48) contiguous jurisdictions of the continental United States.

Adoption of a choice of law rule that gives primary consideration to the law of the place where the accident occurred could conceivably lead to forty-eight different results depending on the peculiar law of the jurisdiction, regardless of the fact that the only contact of that forum is the fortuitous occurrence of an accident within its borders. Such a result clearly ignores the significant principles of certainty, uniformity and predictability as well as the effect that such a rule has on interstate transactions.

The decision as to whether one defendant is entitled to plead and prove a cause of action for indemnity against another should not be determined by the fortuitous happening of an injury-causing event in one jurisdiction as opposed to another. Where, as in this case, the relationship of the parties and of their

conduct and dealings that give rise to the claim for indemnity took place in California, the applicable law on the ultimate issue must be that of California.

In the instant case, it is clear that the State of Arizona has neither significant contacts nor a valid interest in the outcome of a claim for indemnity litigated by the two corporations whose conduct and dealings have no centering in Arizona. For additional discussion and analysis of the underlying considerations deemed relevant, see Leflar, More on Choice - Influencing Considerations, 54 Calif.L.Rev. 1584 (1966).

The District Court erroneously held that Arizona's Supreme Court would most likely adopt a simplistic formula for determining choice of law in this case based solely on the location of the place where the injury occurred. This is a

throw back to the older, discarded approach of lex loci delicti.

Clearly, the Supreme Court of Arizona has abandoned the lex loci delicti test and has opted for a full analysis of the significant contacts in determining the applicable choice of law.

In the only two cases in which the Arizona Supreme Court has been presented with a choice of law issue subsequent to the adoption of the Restatement, it held that the law of the other state, and not Arizona, was applicable to the specific issue presented. Schwartz v. Schwartz, supra, 103 Ariz. 562, 565, 447 P.2d 254 (1968) (law of New York and not law of Arizona applicable to issue of inter-spousal tort immunity); and, Burr v. Renewal Guaranty Corp., 105 Ariz. 549, 468 P.2d 576 (1970) (Colorado law, and not Arizona law, applicable to the issue

of usury). Although neither Arizona case deals with the issue of indemnity between tortfeasors, it is clear that the Schwartz case, supra, is analogous. The Schwartzes were residents of the State of New York who were traveling through Arizona when an accident occurred. The accident was as likely to have occurred in Pennsylvania, Kansas, Oklahoma, Texas or any of the other states through which they had to travel on their way to Arizona. Though the action arose and was filed in Arizona, the question of the applicability of the Arizona law of interspousal tort immunity became an issue requiring the Arizona Court to undertake an analysis of the principles of choice of law. The Arizona Supreme Court concluded that the occurrence of the injury causing event in Arizona was fortuitous and that on the issue of interspousal tort immunity as it affected residents of

another jurisdiction, the State of Arizona had no relevant interest to protect and no significant contacts that would dissuade the Court from applying the law of the State of New York.

Similarly, it is respectfully submitted that the Arizona Supreme Court would consider that the rights and liabilities of two corporations whose dealings, contractual contacts and conduct are all centered in California should be determined by the application of the relevant California law of indemnity.

CONCLUSION

Based upon the foregoing, it is clear that the United States Court of Appeals for the Ninth Circuit decided an issue of state law contrary to the way that issue would have been decided by the Arizona Supreme Court.

Accordingly, it is urged that this

Court grant the writ of certiorari.

DATED this 31st day of December, 1975.

JENNINGS, STROUSS & SALMON

By _____
Jon L. Kyl

By _____
Stephen A. Myers

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Phoenix, AZ 85003
Attorneys for Petitioners

CERTIFICATE OF MAILING

JON L. KYL, one of the attorneys for the petitioners herein, does hereby certify that he did, on the 31st day of December, 1975, cause to be deposited in the United States Post Office at Phoenix, Arizona, the following:

PETITION FOR WRIT OF CERTIORARI

that two (2) copies of the petition for writ of certiorari were placed in an envelope addressed to:

Mr. Richard M. Bilby
Bilby, Thompson, Shoenhair & Warnock, P.C.
9th Floor, Valley National Bank Bldg.
Tucson, AZ 85701
Attorneys for Respondent

and that the necessary postage was prepaid.

_____
Jon L. Kyl

APPENDIX

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U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BELMA SPEARS, surviving widow of WILEY FRANK SPEARS, for and on behalf of herself and her minor son, WILLARD WILEY SPEARS, and BELMA SPEARS, Administratrix of the Estate of WILEY FRANK SPEARS, deceased,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Delaware corporation, and UNARCO INDUSTRIES, INC., an Illinois corporation,

Defendants.

No. 73-2194

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,

Cross-Complainant-Appellee,

vs.

UNARCO INDUSTRIES, INC., an Illinois corporation, and BITUMINOUS CASUALTY COMPANY, a corporation,

Cross-Defendants-Appellants.

MEMORANDUM

On Appeal from the United States District Court for the District of Arizona

Before: BROWNING and DUNIWAY, Circuit Judges, and ORRICK,* District Judge

1. The trial judge found that Unarco and Southern Pacific agreed before trial, for good tactical reasons, not only to defer the filing of cross-claims, but also to litigate the issue of indemnity in a court trial in the same case, before the same judge, in the district court following disposition of the plaintiffs' case against them. This latter portion of the agreement, however, was never

*The Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

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reduced to writing, and is nowhere alluded to in the trial transcript. Nonetheless, we are unable to say that the trial judge's finding is clearly erroneous. It is based upon an affidavit of counsel, the judge's own recollection of the conferences in chambers, and the depositions of the two attorneys who made the agreement.

2. The filing of the California action was properly viewed by the trial judge as an attempt to breach the pre-trial agreement and to obtain a forum more favorable to Unarco and Bituminous. It was not an abuse of discretion for the trial judge to permit amendment of the pleadings, see Foman v. Davis, 1962, 371 U.S. 178, 182; Komie v. Buehler Corp., 9 Cir., 1971, 449 F.2d 644, 647-48; Vickery v. Fisher Governor Co., 9 Cir., 1969, 417 F.2d 466, 470, and to entertain the cross-claim for declaratory relief, see Provident Tradesmens Bank & Trust Co. v. Patterson, 1968, 390 U.S. 102, 126; Brillhart v. Excess Insurance Co., 1942, 316 U.S. 491, 494; Shell Oil Co. v. Frusetta, 9 Cir., 1961, 290 F.2d 689, 691, as a means of enforcing the agreement. The cases counsel restraint in the exercise of the diversity jurisdiction over claims for declaratory relief involving issues already pending between the parties in a state court. But this is not a case in which a claim for declaratory relief has been misused as a means of forum shopping. Here, it was used to defeat forum shopping in breach of the parties' agreement.

3. As to the choice of law issue, in diversity cases federal courts are bound to apply the conflicts rules of the forum state, Klaxon Co. v. Stentor Electric Mfg. Co., 1941, 313 U.S. 487. In addition, "[a]nalysis by a district judge of the law of the state in which he sits, his determination of the result which the highest court of that state

would probably reach under the same facts, is entitled to great weight. . . . That determination 'will be accepted on review unless shown to be clearly wrong.'" United States v. Pollard, 9 Cir., July 2, 1975, ___F.2d___ (slip op. at 4); Owens v. White, 9 Cir., 1967, 380 F.2d 310, 315; Minnesota Mutual Life Insurance Co. v. Lawson, 9 Cir., 1967, 377 F.2d 525; Bellon v. Heinzig, 9 Cir., 1965, 347 F.2d 4.

Arizona has adopted the grouping of contacts approach of the Restatement Second, Conflict of Laws. Schwartz v. Schwartz, 1968, 103 Ariz. 562, 447 P.2d 254. Comment b to § 173 of the Restatement Second, Conflict of Laws is as follows:

> On occasion, the law of torts may give one joint tortfeasor a right to indemnity against another joint tortfeasor. When both parties are domiciled in the same state, and particularly, if in addition there is a special relationship between them which is centered in this state, the right of one party to obtain indemnity from the other may be determined by the local law of the state where the relationship is centered. In other situations, a right of indemnity in tort will usually be determined by the local law of the state of conduct and injury. (emphasis added)

Unarco and Southern Pacific are not domiciled in the same state. Some of the conduct causing the injury occurred in Illinois, some in Indiana, some in California, and some in Arizona. The injury was incurred in Arizona. On these facts we cannot say that the trial judge was clearly wrong in holding that the Supreme Court of Arizona would apply Arizona law. Under that law, Unarco is not entitled to indemnity.

Affirmed.

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JURISDICTION

The Court is without jurisdiction to grant a writ of certiorari for the reason that 28 USC Section 2101(c) specifically provides:

> §2101. Supreme Court; time for appeal or certiorari; docketing; stay
>
> . . . .
>
> (c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.
>
> . . . .

Included in the appendix is the notice sent to counsel by the Clerk of the U. S. Court

of Appeals for the Ninth Circuit wherein it is stated that "... a judgment was entered September 17, 1975, [a]ffirming the judgment or order of the Court below ..." Because petitioners neither filed a motion for rehearing nor an application for an extension of time in which to petition for certiorari, the ninety-day statutory period expired on December 16, 1975. The petition for writ of certiorari is dated December 31, 1975, and is therefore untimely. While the mandate of the court of appeals did not issue until October, 1975, the statute is clear that it is the date of the entry of judgment in the court of appeals which determines jurisdiction for certiorari and not the date of the issuance of the mandate. Boylan v. United States, 257 U.S. 614 (1921) (per curiam).

STATEMENT OF THE CASE

In accordance with Rule 40(3) of the

Suppreme Court Rules, respondent supplements and corrects petitioners' statement of the case as follows:

SOUTHERN PACIFIC TRANSPORTATION COMPANY (hereinafter SOUTHERN PACIFIC) maintains hundreds of miles of tracks in Arizona and employs hundreds of Arizona residents. It pays Arizona taxes annually in the hundreds of thousands of dollars. The decedent, Wiley Spears, worked in Bisbee, Arizona, where he was injured while opening a load divider door designed and manufactured for SOUTHERN PACIFIC by UNARCO. When he loosened a handle in the door, a broken swivel pin caused the door to fall and crush him. He was admitted to a hospital located in Tucson, Arizona, where he died six months later.

The testimony at the trial indicated that UNARCO, an Illinois corporation with its principal place of business in Illinois, received an order for the divider doors in

1964 from SOUTHERN PACIFIC, a Delaware corporation with its principal place of business in California. Although the contract for the doors was entered in Illinois, the doors were manufactured in Indiana by a subcontractor of UNARCO. The purpose of the doors was to separate freight within railroad cars. When in an unlocked position, a door was solely dependent upon a swivel pin as its only safety device. In the event the swivel pin failed, the door would also fail. Fifteen sets of the doors were installed in a series of cars. During June of 1966, a pin in one car failed in California, causing an accident. A subsequent investigation by UNARCO and SOUTHERN PACIFIC officials indicated that the swivel pin needed to be reinforced. Accordingly, UNARCO officials redesigned and fabricated a new pin in Illinois. These pins were then sent to California for installation in the 15 cars

in question.

SOUTHERN PACIFIC records introduced at the trial indicated that the new pins were installed in the door which crushed Mr. Spears. This was a contested issue at the time of the trial as the two pins in this car exhibited some qualities of both the old and the new pins. The case was submitted to the jury on theories of negligence and strict liability in tort as against UNARCO but only in negligence as against SOUTHERN PACIFIC. When the sole issue of indemnity was appealed by petitioners to the Ninth Circuit Court of Appeals, SOUTHERN PACIFIC argued that while Arizona law clearly applied under the facts of the case, the petitioners were not entitled to indemnity under either the law of Arizona or the law of California.

ARGUMENT

Petitioners concede in their petition for writ of certiorari that the district

court was required to apply the choice of law rules of Arizona. They also concede that they are entitled to no relief if Arizona indemnity law is applicable. They contend, however, that the district court should have applied California indemnity law because the Arizona choice of law rules require such a result. The district court determined that the facts of the case required that Arizona indemnity law be applied Addressing itself to this ruling by the district court, the court of appeals noted in its memorandum opinion that:

> "[a]nalysis by a district judge of the law of the state in which he sits, his determination of the result which the highest court of that state would probably reach under the same facts, is entitled to great weight. ... That determination 'will

be accepted on review unless shown to be clearly wrong.'" United States v. Pollard, ____ F.2d ____ (slip. op. at 4) 9 Cir. July 2, 1975); Owens v. White, 380 F.2d 310, 315 (9 Cir. 1967); Minnesota Mutual Life Ins. Co. v. Lawson, 377 F.2d 525 (9 Cir. 1967); Bellon v. Heinzig, 347 F.2d 4 (9 Cir. 1965).

The Restatement (Second) of Conflicts devotes a separate section to contribution and indemnity among tortfeasors. Restatement (Second) of Conflicts, Section 173 (1971). Section 173, however, refers the reader back to Section 145 which contains the general tort choice of law rules. Before considering Section 145, however, it is necessary to consider the comments of the drafters of the Restatement on the matter of indemnity

and the choice of law. Comment (b) to Section 173 contains the following discussion:

> On occasion, the law of torts may give one joint tortfeasor a right to indemnity against another joint tortfeasor. When both parties are domiciled in the same state, and particularly, if in addition there is a special relationship between them which is centered in this state, the right of one party to obtain indemnity from the other may be determined by the local law of the state where the relationship is centered (see Illustration 1). In other situations, a right to indemnity in tort will usually be determined by the local law of the state of conduct and injury. (Emphasis added)

UNARCO is an Illinois corporation domiciled in Illinois. SOUTHERN PACIFIC is a Delaware corporation domiciled in California with offices in many states including Arizona. If any special relationship existed between these two parties, it was in Illinois where contractual relations were entered. The fact that SOUTHERN PACIFIC originated its order for the doors in California does not center its relationship with UNARCO in that state; nor does the fact that UNARCO sent the defective doors and pins to California. Any relationship is centered in Illinois where UNARCO accepted the order and designed the goods called for in the contract. The situs of the contractual relations was in Illinois and that is the only possible "special relationship" between the parties.

Because the parties are not domiciled in the same state and because the only

possible "special relationship" would be in Illinois, application of the choice of law principles found in Section 173, comment (b), indicates that any right to indemnity must be determined by the local law of the state of conduct and injury. Injury was solely in Arizona, while negligent conduct occurred in a number of states. Negligence occurred in Illinois because that is where the faulty pins were designed, where UNARCO failed to change the number on the pins so that a new pin could be distinguished from an old one, and where UNARCO failed to institute any inquiries as to whether the new pins had in fact been installed. Negligence also occurred in Indiana as that is where the new pins were manufactured and where they were marked so that all pins, old and new, looked alike. Negligence occurred in California because that is where the old pin allegedly was not replaced by the new pin sent from Illinois.

And finally, negligence occurred in Arizona as that is where the decedent opened the door which crushed him because of the faulty pin. Negligence clearly occurred in four states while the "injury" referred to in comment (b) occurred only in Arizona.

Section 145, to which Section 173 refers, contains a number of factors to be considered in determining the proper law to apply. Accordingly, the considerations in Section 145(2) will be discussed according to the order in which they appear therein.

(a) The place where the injury occurred. The injury occurred in Arizona and it is absurd to contend that this accident was fortuitous. Thousands of SOUTHERN PACIFIC railroad cars pass through Arizona each year. Accidents involving various railroads have caused many personal injuries within Arizona and to contend that these accidents were all purely fortuitous because

trains move in interstate commerce is simply to ignore the many accidents which have occurred. This is not the case of an infrequent plane crash which just happened to occur in Arizona, involving citizens from many other states. Petitioners' reasoning would make any accident involving an interstate carrier a fortuitous event. Arizona has a right as well as an obligation to apply its laws when train accidents occur as frequently as they do within its borders, especially when its residents are injured and when its taxpayers are alleged to be tortfeasors. Arizona clearly has an interest in applying its laws to railroad accidents occurring in Arizona due to the alleged negligence of the SOUTHERN PACIFIC railroad.

(b) The place where the conduct causing injury occurred. Because negligent conduct occurred in Illinois, Indiana, California and Arizona, no state has a

primary contact under this consideration.

(c) The domicile, residence, nationality, place of incorporation and place of business of the parties. Neither party is incorporated, domiciled nor does its major business in the same state. Consequently, more emphasis must be placed on the locations of the injury and negligent conduct. Restatement (Second) of Conflicts, Section 173, comment (b) supra.

(d) The place where the relationship between the parties is centered. A special relationship does not occur simply because a single party orders and receives goods in one state. A relationship occurs, however, when two parties are involved in a transaction in one central location. The facts indicate that the only possible central location is in Illinois where UNARCO accepted the order, thereby entering into contractual relations with SOUTHERN PACIFIC. Before the

order was accepted, there was no relationship whatsoever. Similarly, UNARCO's relationship with its customers is centered where contractual relations are consummated, not where goods are subsequently shipped.

The Supreme Court of Arizona has indicated that the grouping of contacts is to be qualitative rather than quantitative. Schwartz v. Schwartz, 103 Ariz. 562, 447 P.2d 254 (1968). Surely both the qualitative and quantitative contacts in this case require that Arizona law be applied. The case law cited by petitioners involves different factual situations and does not compel a different result. Both Kantlehner v. United States, 279 F. Supp. 122 (E.D.N.Y. 1967); and Maryland v. Capital Airlines, Inc., 280 F. Supp. 648 (S.D.N.Y. 1964) involved airplanes which just happened to crash in Maryland after flying over a number of states. Contrary to the present factual situation

where Arizona has significant contacts with the injured parties and one of the tortfeasors, the Capital Airlines court found no contacts whatsoever in Maryland and determined that a special relationship existed in New York because both tortfeasors "did business in New York, most of the negotiations ... took place in New York, the chattel mortgages on the airplanes sold [were] filed in New York and [one of the tortfeasors] maintained a New York bank account to receive monies under the sales arrangement." 280 F. Supp. at 650. In the present factual situation, this theory would best apply to Illinois. The Kantlehner court simply determined that because the decedent was a New York resident and no other state appeared to have any conceivable interest, the forum state of New York should apply its own law because it should always attempt to advance its policies when possible. 279 F. Supp. at 127. This

theory would appear to require the choice of Arizona law.

CONCLUSION

After considering the qualitative contacts and the well established Arizona policy prohibiting indemnity between joint tortfeasors who commit negligent acts in Arizona, it is obvious which law must be applied. The parties are not domiciled nor do they do their principal business in the same state. Similarly, there is no special relationship between the parties in the two states in issue. Consequently, the only qualitative contacts are the place of conduct and the place of injury. Injury was solely in Arizona while conduct occurred in four states including Arizona. The principles of the Restatement clearly dictate that Arizona law must prevail. Accordingly, the petition for writ of certiorari should be denied not only because the Court lacks jurisdiction but

also because it is clear that the district court correctly applied the choice of law rules of Arizona.

Dated this 22 day of January, 1976.

BILBY, THOMPSON, SHOENHAIR &
WARNOCK, P.C.

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Harold C. Warnock

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CERTIFICATE OF SERVICE

HAROLD C. WARNOCK, one of the attorneys for the respondent herein, does hereby certify in accordance with Rule 33(3)(b) of the Supreme Court Rules, that he did, on the 22 day of January, 1976, cause to be deposited in the United States Post Office at Tucson, Arizona, the following:

RESPONDENT'S BRIEF IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI,

that three (3) copies of the said respondent's brief in opposition to the petition for writ of certiorari were placed in an envelope addressed to:

Jon L. Kyl
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for petitioners,

that the necessary postage was prepaid, and that all parties required to be served have been served.

Harold C Warnock
Harold C. Warnock

APPENDIX

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

September 17, 1975

73-2194 BETTA SPEARS, ETC. ET AL vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered September 17, 1975 AFFIRMING the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Paul H. Wolfe, Jr.
Clerk
U.S. Court of Appeals